869

ADMINISTRATIVE LAW BULLETIN

JAN. 10 1949-50

Vol. 1-3 • No. 1

ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

THE NEW BULLETIN

These bulletins, issued occasionally by the Administrative Law Section for its members, will serve two principal purposes. The first is to afford a necessary means of communication between Section members, for the better transaction of Section business between meetings. The second is to afford Section members timely information of importance about current administrative law, particularly that of federal agencies and courts. The Bulletin will thus function both as a "house organ" and as a medium to inform the interested lawyer of significant developments and new sources in administrative law.

AN ADMINISTRATIVE LAW PROGRAM

At the Seattle meeting of the Section last fall Senator Alexander Wiley, then chairman of the Senate Judiciary Committee, summarized current activities in the field of federal administrative law as follows (see the full address at 34 A. B. A. J. 877):

(1) The proper interpretation and *enforcement* of the Administrative Procedure Act;

(2) The appointment of "qualified and competent *Examiners*" to hold hearings and make or recommend decisions in formal administrative cases;

(3) The adoption of an adequate statute regulating *admissions* to administrative practice, fixing or providing a means for fixing the standards and ethics of administrative practice, and providing disciplinary machinery; and

(4) The formulation and adoption of *uniform rules* of administrative procedure for federal agencies.

It is a worthy program, to which not only the whole bar but other professional and business interests may well subscribe.

I. C. C. VIEW OF PROCEDURE ACT

The following excerpt is from the 1947-1948 report of Harry C. Ames, retiring president of the Interstate Commerce Commission Practitioners' Association (see December 1948 *I. C. C. Practitioners' Journal*, 218-219):

> The Administrative Procedure Act has now been in effect more than two years and, as the report of the Special Committee on Rules of Practice indicates, everyone interested is still searching in vain for some profound effect it has had upon practice before the Commission. To those of us who opposed the Bill and worked with the Committee of the American Bar Association prior to its enactment this is not surprising. As a matter of fact, so many changes were made in the Bill, as originally drafted, in deference to the well-established rules governing the Commission that it may fairly be said that the latter rules were virtually a working model. If the Act has caused any discernible changes in the Commission's conduct of its administrative duties they are of such a nature as to assist, rather than handicap, the practitioner. For example, the rules requiring the specification of reasons for denials of petitions and the spelling out of basic findings with more particularity are certainly not objectionable to us and the reports and denial orders of the Commission indicate that it is endeavoring to comply with the letter and spirit of the rules. Additionally, and again to our benefit, it seems clear that the scope of judicial review of Commission orders and the

matter of judicial censorship over the evidence have been broadened by the act and that the latter is not, as indicated in the Manual of the Attorney General, merely a restatement of existing law so far as judicial review is concerned. Thus far the Supreme Court has had no occasion to make a definite statement in this connection but the decisions of the lower courts show a definite trend in the direction that courts may no longer resort with too much confidence to the doctrine of administrative finality.

Members of the Administrative Law Section will recall that the Interstate Commerce Commission, and its Practitioners' Association, were the sole important opponents of the Administrative Procedure Act at the hearings thereon before the House Judiciary Committee in 1945.

WHAT REQUIRES A HEARING?

One of the few significant controversial issues so far to appear under the federal Administrative Procedure Act concerns the applicability of sections 5, 7, and 8 to proceedings in which the basic statute does not expressly require the administrative agency either to accord a hearing or to act on the record thereof. Question arises because sections 4 (b) and 5 (introductory clause) of the Administrative Procedure Act make certain important provisions of the Act applicable only to cases of administrative rule making or adjudication "required by statute to be determined on the record after opportunity for an agency hearing".

But in adopting this quoted language in the Act the Judiciary Committee of the House of Representatives explained it very precisely as follows (Senate Document No. 248, 79th Congress, page 285, note 9, emphasis supplied):

> A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and *in either situation sections 7 and 8 would apply* save as other exceptions are operative.

By this language it appears plain that Congress not only (1) took account of the situation in which statutes do not expressly use the word "hearing", or do not explicitly require decision to be made "on the record thereof" but (2) also recognized that at the same time such failure to use these terms expressly was "the usual case" and the proceedings should nevertheless be governed by the provisions in question.

Yet the federal trial court, and the Court of Appeals for the District of Columbia, have reached the contrary result in cases arising under the postal fraud-order laws. In the latter the pertinent statutes mention "evidence" but do not use the word "hearing" although courts have long held that a hearing is required. On January 3 the Court of Appeals ruled in *Bersoff* v. *Donaldson* that

> The fraud order statutes do not in terms require a hearing. Therefore, we think, they do not come within the scope of the procedural provisions of the Administrative Procedure Act.

It does not appear that the court was advised of the legislative history quoted in the previous paragraph. There are also other arguments, of a background nature, which require different decision.

OFFICERS AND CHAIRMEN, 1948-1949

The following are the names and addresses of Section officers and chairmen for 1948-1949:

Chairman of Section. W. James MacIntosh, 123 S. Broad St., Philadelphia 9, Pa.

Vice chairman. Ashley Sellers, 1302 18th St., N. W., Washington 6, D. C.

Secretary. Patricia H. Collins, Assistant Solicitor General's Office, Department of Justice, Washington 25, D. C.

National committee. Ashley Sellers, Chairman, 1302 18th St., N. W., Washington 6, D. C.

Committee on statement of principles. Raymond S. Smethurst, Chairman, 623 Investment Bldg., Washington 5, D. C.

Committee on standards of conduct for administrative officials. Ralph Kleps, Chairman, 1020 N St., Sacramento 14, Calif.

Committee on admission to practice before administrative agencies. Aaron L. Ford, Chairman, Munsey Bldg., Washington, D. C.

Committee on state administrative law. Charles B. Nutting, Chairman, Law School, University of Pittsburgh, Pittsburgh, Pennsylvania.

Committee on federal administrative procedural rules. Carl McFarland, Chairman, 1302 18th St., N. W., Washington 6, D. C.

Committee on food, drug, and cosmetic law. Charles Wesley Dunn, Chairman, 608 Fifth Ave., New York 20, N. Y.

Committee on selection and qualification of examiners and personnel. Robert E. Freer, Chairman, 712 Jackson Place, N. W., Washington 6, D. C.

Committee on membership. Don E. Petty, Chairman, 1771 N St., N. W., Washington 6, D. C.

Committee on state administrative law essay contest. Omar C. Spencer, Chairman, Yeon Bldg., Portland 4, Oregon. J. Tyson Stokes, Co-chairman, 123 S. Broad St., Philadelphia 9, Pa.

Committee on immigration, naturalization and aliens. Jack Wasserman, Chairman, 1406 G St., N. W., Washington, D. C.

HOW TO OPERATE SECTION COMMITTEES

Chairmen of committees of the Section are appointed by the Section Chairman. They and he then agree upon committee memberships. When and as soon as so established, committees are expected to become active promptly and operate continuously to the end of the Association year.

Essentially the method of committee operation should be by correspondence, although committees may well meet at Annual Meetings of the Association. Meetings at other times should be rare, limited to very special occasions for unusual cause. If Section expense is thereby involved, the approval of the Section chairman is necessary.

Apart from meetings, operation of committees by correspondence may include the following steps:

(1) The committee chairman should by letter ascertain the desires or suggestions of the Section officers as to the objectives, nature, scope, and method of work of the particular committee for the year. The Section Council will have previously met or been consulted, with respect to the Section program for the year.

(2) The committee chairman should then tentatively state his program and circulate it to the members of his committee for their suggestions. Significant changes or additions may then require a restatement of the final program. The agreed program should be sent to the Publications Board of the Section, for possible use in this Bulletin.

(3) Except to the extent already included in the committee program, the committee chairman should then issue instructions to each committee member as to the work expected of the latter

From this point on, operation will naturally differ in accordance with the particular program adopted.

(4) The work of the committee should lead to a comprehensive report which, in final form, should be presented at the Annual Meeting of the Section at the close of the Association year. However, tentative or final conclusions, recommendations, etc., may and should take form earlier in the Section and Committee year, for presentation to the Section Council or publication in this Bulletin or both.

SECTION ESSAY CONTEST

For the purpose of promoting the development of a literature of state administrative law the Administrative Law Section in 1947 launched a nation-wide essay contest. Each paper must be devoted to the administrative law of some state. The closing date of the contest is September 1, 1949. Any member of the American Bar Association may participate except officers and council members of the Administrative Law Section. First prize will be $1500 and second prize $500. Special prizes have also been arranged for the best essays on the administrative law of Arizona, Arkansas, Colorado, Delaware, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Texas, Virginia, and West Virginia. Other special state prizes may be added. In addition, it is planned that the best paper on the administrative law of each state will be printed in a volume designed thus to cover the administrative law of all the states. Further information will be carried from time to time in the Bulletin. Inquiries concerning the contest rules or the contest generally should be addressed to Omar C. Spencer, Esq., Chairman Contest Committee, Yeon Building, Portland 4, Oregon, or to J. Tyson Stokes, Esq., 123 South Broad Street, Philadelphia 9, Pa., the newly appointed Co-Chairman of the Contest Committee.

ADMINISTRATIVE LAW SECTION BY-LAWS

ARTICLE I

NAME AND PURPOSE

Section 1. This Section shall be known as the Section of Administrative Law.

Section 2. Purpose of this Section shall be to promote the sound development of local, state, and federal administrative law procedure and practice.

ARTICLE II

MEMBERSHIP

Section 1. Each member of the Section shall pay to the American Bar Association annual dues of three dollars. Any member of the Association, upon request to the Secretary of the Association and upon payment of dues for the current year, shall be enrolled as a member of this Section. Thereafter said dues shall be paid in advance each year beginning on the July first next succeeding such enrollment. Any member of this Section whose annual dues shall be more than six months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section.

ARTICLE III

OFFICERS

Section 1. The officers of this Section shall be a Chairman, Vice-Chairman and Secretary.

Section 2. There shall be a Council, which shall consist of the Chairman, Vice-Chairman and Secretary, all of whom shall be members ex-officio, together with eight other members to be elected by the Section as hereinafter provided.

Section 3. The Chairman, Vice-Chairman, and Secretary shall be nominated and elected, in manner hereinafter provided, at each annual meeting of this Section, to hold office for a term beginning at the close of the annual meeting at at the close of the next succeeding annual meeting which they shall have been elected, and ending of the Section, and until their successors shall have been elected and qualified.

Section 4. At the annual meeting of the Section at which these by-laws shall have been adopted two members of the Council shall be nominated and elected to serve for one year; two, for two years; two, for three years; and two, for four years. ("Year", as herein used, meaning a term beginning at the close of the annual meeting at which they shall have been elected and ending at the close of the first, second, third, or fourth succeeding annual meeting of this Section, respectively). Thereafter, upon the expiration of each of these initial terms, two members of the Council shall be elected at each annual meeting of the Section, for terms of four years beginning at the close of the annual meeting at which they shall have been elected and ending at the close of the fourth succeeding annual meeting of the Section.

Section 5. No person shall be eligible for election as a member of the Council if he is then a member of the Council and has been such member continuously for a period of three years or more.

Section 6. If any elected member of the Council shall fail to attend two successive meetings of the Council, the office held by such member shall be automatically vacated, and the Council shall fill the vacancy for the unexpired term.

ARTICLE IV

Nomination and Election of Officers

Section 1. *Nominations.* At the first session of each annual meeting of the Section the Chairman shall appoint a Nominating Committee of three members of the Section not members of the Council, which committee shall make and report nominations to the Section for the offices of Chairman, Vice-Chairman, Secretary, and members of Council, to succeed those whose terms will expire at the close of the then annual meeting, and to fill vacancies then existing for unexpired terms. Other nominations for the same offices may be made from the floor.

Section 2. *Elections.* All elections shall be by written ballot unless otherwise ordered by resolution duly adopted by the Section at the annual meeting at which the election is held.

ARTICLE V

Duties of Officers

Section 1. *Chairman.* The Chairman shall preside at all meetings of the Section and of the Council. He shall formulate and present at each annual meeting of the American Bar Association a report of the work of the Section for the then past year. He shall perform such other duties and acts as usually pertain to his office.

Section 2. *Vice-Chairman.* Upon the death, resignation or during the disability of the Chairman, or upon his refusal to act, the Vice-Chairman shall perform the duties of the Chairman for the remainder of the Chairman's term except in case of the Chairman's disability and then only during so much of the term as the disability continues.

Section 3. *Secretary.* The Secretary shall be the custodian of all books, papers, documents, and other property of the Section, except money. He shall keep a true record of the proceedings of all meetings of the Section and of the Council, whether assembled or acting under submission. With the Chairman, he shall prepare a summary or digest of the proceedings of the Section at its annual meeting for publication in the Annual Report of the American Bar Association, after approval by the Association's Committee on Publications. He, in conjunction with the Chairman, as authorized by the Council, shall attend generally to the business of the Section. He shall keep an accurate record of all moneys appropriated to and expended for the use of the Section.

ARTICLE VI

Duties and Powers of the Council

Section 1. The Council shall have general supervision and control of the affairs of the Section subject to the provisions of the Constitution and by-laws of the American Bar Association and the by-laws of this Section. It shall especially authorize all commitments or contracts which shall entail the payment of money, and shall authorize the expenditure of all moneys appropriated for the use or benefit of the Section. It shall not, however, authorize commitments or contracts which shall entail the payment of more money during any fiscal year than the amount which shall have been previously appropriated to the Section for such fiscal year.

Section 2. The Council may authorize the Chairman to appoint committees from Section members to perform such duties and exercise such powers as the Council may direct, subject to the limitations of these By-laws and the By-laws of the American Bar Association.

Section 3. The Council, during the interim between annual meetings of the Section, may fill

vacancies in its own membership or in the office of Secretary or, in the event of a vacancy in both the office of Chairman and Vice-Chairman, then in the office of Chairman. Members of the Council, and officers, so selected shall serve until the close of the next annual meeting of the Section.

Section 4. All binding action of the Council shall be by a majority vote of the whole Council.

Section 5. Members of the Council when personally present at a meeting of the Council shall vote in person, but when absent may communicate their vote, in writing, upon any proposition, to the Secretary and have it counted, with the same effect as if cast personally at such meeting.

Section 6. The Chairman of the Section may, and upon the request of any member of the Council shall, submit or cause to be submitted in writing, to each of the members of the Council, any proposition upon which the Council may be authorized to act, and the members of the Council may vote upon such proposition or propositions so submitted, by communicating their vote thereon, in writing over their respective signatures, to the Secretary, who shall record upon his minutes each proposition so submitted, when, how, at whose request same was submitted, and the vote of each member of Council thereon, and keep on file such written and signed votes. If the votes of a majority of the members of Council so recorded shall be in favor of such proposition or if such majority shall be against such proposition, such majority vote shall constitute the binding action of the Council.

ARTICLE VII

MEETINGS

Section 1. The annual meeting of the Section shall be held during the annual meeting of the American Bar Association, in the same city or place as such annual meeting of the American Bar Association, with such program and order of business as may be arranged by the Council.

Section 2. Special meetings of the Section may be called by the Chairman upon approval of Council, at such time and place as the Council may determine.

Section 3. The members of the Section present at any meeting shall constitute a quorum for the transaction of business.

Section 4. All binding action of the Section shall be by a majority vote of the members present.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

Section 1. The Fiscal Year of the Section shall be the same as that of the American Bar Association.

Section 2. All bills incurred by the Section, before being forwarded to the Treasurer of the American Bar Association for payment, shall be approved by the Chairman or the Secretary, or, if the Council shall so direct, by both of them.

Section 3. No salary or compensation shall be paid to any officer, councillor or member of a committee.

Section 4. Any action by this Section must be approved by the American Bar Association before the same becomes effective as the action of the American Bar Association. Any resolution adopted or action taken by this Section may on request of the Section be reported by the Chairman of the Section to the annual meeting of the American Bar Association for the Association's action thereon.

Section 5. These by-laws shall become effective upon the approval thereof by the House of Delegates upon recommendation of the Board of Governors of the American Bar Association and by this Section.

Section 6. All printing for the Section or for the Council or any committee of the Section shall be done under the supervision of the headquarters office of the American Bar Association.

ARTICLE IX

AMENDMENTS

These by-laws may be amended at any annual meeting of the Section by a majority vote of the members of the Section present and voting, provided such proposed amendment shall first have been approved by a majority of the Council and provided, further, that no amendment so adopted shall become effective until approved by the House of Delegates upon recommendation of the Board of Governors of the American Bar Association.

ADMINISTRATIVE LAW BULLETIN is published occasionally at Washington, D. C., for its members by the Section of Administrative Law of the American Bar Association. Communications should be addressed to Carl McFarland, Chairman, Publications Board, 1302 18th St. N. W., Washington 6, D. C.